

IN THE UNITED STATES DISTRICT COURT  
IN AND FOR THE DISTRICT OF DELAWARE

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NOX MEDICAL EHF, : CIVIL ACTION  
Plaintiff, :  
vs. :  
NATUS NEUROLOGY, INC., :  
Defendant. : NO. 15-709 (RGA)

- - -

Wilmington, Delaware  
Friday, April 13, 2018  
11:04 o'clock, a.m.

- - -

BEFORE: HONORABLE RICHARD G. ANDREWS, U.S.D.C.J.

- - -

APPEARANCES:

POTTER, ANDERSON & CORROON LLP  
BY: BINDU A. PALAPURA, ESQ.

-and-

Valerie J. Gunning  
Official Court Reporter

1 APPEARANCES (Continued):

2 WORKMAN NYDEGGER

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## P R O C E E D I N G S

(Proceedings commenced in the courtroom,  
beginning at 11:04 a.m.)

THE COURT: All right. Please be seated.

Good morning. This is Nox versus Natus, Civil  
Action No. 15-709, the pretrial conference.

Ms. Palapura?

MS. PALAPURA: Good morning, Your Honor.  
Bindu Palapura from Potter Anderson on behalf of plaintiff.  
And with me today from Workman Nydegger is Chad Nydegger and  
Brent Lorimer.

THE COURT: All right. Good morning to you  
all.

And Mr. Connolly?

MR. CONNOLLY: Good morning, Your Honor. Arthur  
Connolly for defendant Natus.

With me today are my co-counsel, Thomas  
Reynolds, Alan Neigroski, Joseph Jacobi and Jeremy Adelson.

THE COURT: All right. Well, good morning to  
you all, too.

All right. I have some things in the pretrial  
order, which I will get to in a moment.

One thing I want to state first is for the

1 trial, you're going to need to provide a glossary of terms  
2 and names to the court reporters on the morning of trial.  
3 When playing depositions, provide the court reporters with  
4 the designations highlighted before playing the videos. And  
5 provide the court reporter with a copy of each exhibit  
6 notebook at the same time as it's provided to the witness.  
7 Okay? All right.

8 So before we go through the things that I have  
9 here, is there anything that you all think that I ought to  
10 be doing first that you want to bring up? Otherwise, we'll  
11 just start going through the pretrial order.

12 MR. NYDEGGER: Yes, Your Honor. We had a few  
13 items to discuss and clarify.

14 THE COURT: Okay.

15 MR. NYDEGGER: Good morning, Your Honor. These  
16 have to do with the motions in limine that the orders came  
17 out on yesterday.

18 THE COURT: All right.

19 MR. NYDEGGER: And the motion ruling on, or the  
20 order ruling on the motion in limine number one filed by  
21 Nox Medical, we did want to seek clarification about the  
22 core statement that the Nox RES alone could be used as a  
23 reference.

24 THE COURT: Yes.

25 MR. NYDEGGER: The reason we --

1 THE COURT: When I say "alone," I mean with the  
2 ordinary skilled artisan or whatever it is that they're  
3 using to round it out. Of course, I think they're also  
4 going to be doing the McIntire.

5 MR. NYDEGGER: Yes. They did have a specific  
6 combination. The reason we're seeking clarification was  
7 because the Court's rule on summary judgment that Nox RES  
8 does not anticipate.

9 THE COURT: That's true.

10 MR. NYDEGGER: And also that their witness is  
11 precluded from testifying that the Nox RES belt teaches the  
12 receiving hole, and so we want a clarification. It seems to  
13 be inconsistent.

14 THE COURT: Right. I think you got this right,  
15 which is, they can't say they anticipate. They can't say  
16 it's obvious because it anticipates. They have to abide by  
17 my ruling that it doesn't anticipate, but I assume, as I  
18 think I saw somewhere, they're going to try to fill in that  
19 gap by saying in so many words, it's obvious. Right?  
20 Right?

21 MR. NYDEGGER: That's correct, yes. Yes.

22 THE COURT: All right.

23 MR. NYDEGGER: And then on that note, Your  
24 Honor, there's no disclosure in the expert report of  
25 modifying the receiving hole to meet the claims, just on its

1 own in view of ordinary skill in the art. That's not  
2 disclosed at all anywhere in the expert report.

3 THE COURT: What do you have to say about that,  
4 Mr. Reynolds?

5 MR. REYNOLDS: Your Honor, and I think that this  
6 will clear up not just the question that Mr. Nydegger has,  
7 but the question you asked us about some other disclosure,  
8 too.

9 We've all gone down a rode here that I think is  
10 misleading, and that is that these very specific  
11 permutations and combinations, that's not the way we're  
12 going to present this to the jury. I mean, that's not the  
13 way these things come into the case.

14 We have one argument, one single argument  
15 against claim 1. That is that the RES belt, which you found  
16 on summary judgment does not anticipate, and we're fine with  
17 that, we say, okay. There's an element missing from the RES  
18 belt, and that is that the receiving hole doesn't perform  
19 the fastening function. Remember that's what you found in  
20 the summary judgment.

21 Our argument is that the RES belt -- and  
22 Hermannsson is the patent -- the RES belt is a commercial  
23 embodiment of the Hermannsson patent. Hermannsson is a bad  
24 word, of course, because, it is also the name of the  
25 patent-in-suit, but we know what we're talking about here.

1 To the jury, we'll have to explain that.

2 But the point is, we have a single prior art  
3 reference and we say exactly what you just said, that that  
4 reference discloses everything in claim 1 except one thing  
5 is missing. It doesn't know the fastening function. But  
6 jury, Your Honor, that's in spades in prior the art. One of  
7 ordinary skill in the prior art would know it. That's what  
8 this is. McIntire shows it, Harhen shows it. It's in  
9 spades. There's a million places we can that show it. That  
10 is the whole case. This is a one-day invalidity case on  
11 claim 1.

12 The only reason prior art has been swimming  
13 around in there and the only reason that these permutations  
14 and combinations have been laid out, A plus B, B plus A, is  
15 because there's other prior art that we at least are keeping  
16 there in case, we don't know what their validity position  
17 is. We think it's that one single missing element of claim  
18 1 that the receiving hole does not do the fastening. But  
19 they are trying to keep alive every word of claim 1 and  
20 every detail of the dependent claims even though there's no  
21 independent basis of validity in those dependent claims,  
22 there's no argument that there is, but we didn't resolve all  
23 of that because we didn't, frankly, probably bring enough  
24 points in our summary judgment to try to clean up those  
25 other issues.

1 I think the trial is a one-day validity case.  
2 We make this argument to the jury. It's a single argument  
3 and it's about the receiving hole. But we've got a  
4 situation here, Your Honor, where normally, the patentee has  
5 to kick a field goal through a goalpost with two uprights,  
6 infringement and validity. They have to be broad enough  
7 that they snare the accused product but narrow enough to  
8 avoid invalidity. That's navigating -- what you see in the  
9 Federal Circuit rulings.

10 But here we have taken the one upright and they  
11 just have to kick a field goal, kick anywhere 20 yards to  
12 the right. They just have to find some word in claim 1 or  
13 some detail they're going to argue that's in a dependent  
14 claim that saves the validity. I don't think that's what  
15 this case should be about. It should be about one thing,  
16 and it should be a one-day trial, and that's the validity  
17 case.

18 So this is our case, Your Honor. It clears up I  
19 think the question you had, too. You had asked specifically  
20 about whether the IPR disclosed a particular combination  
21 with regard to claim 4 or 5. The answer is, yes, it did,  
22 and I could argue specifically why. That's our argument.  
23 I'm disclosing it to everybody. Clearly, that's what we  
24 plan to do with the jury. The jury doesn't look at this as  
25 specific analytical combinations of A plus B, A plus B plus



1 C, A plus B plus C. That's where you get all of these  
2 arguments and permutations.

3 THE COURT: All right. Thank you.

4 MR. NYDEGGER: Your Honor, as Mr. Reynolds just  
5 said, the defendants, they are saying we have all of this  
6 prior art out there and we're going to argue all of it.  
7 Well, we're entitled to know, especially at this stage,  
8 exactly what they're going to argue.

9 He says they're not --

10 THE COURT: Mr. Nydegger, he just told you what  
11 he's going to argue. That doesn't mean he can't bring in  
12 this other prior art to put it all in context. Part of what  
13 you are supposed to do in obviousness are the nature and  
14 scope of the prior art.

15 MR. NYDEGGER: Well, I still don't know. Are  
16 they arguing the RES belt would be modified by a PHOSITA?  
17 Would it be modified just by knowledge of a PHOSITA?

18 THE COURT: Apparently, the RES belt and the  
19 Hermannsson, or the patent. That's what he just said.

20 MR. NYDEGGER: That's your combination? I did  
21 not understand it.

22 MR. REYNOLDS: The RES belt and Hermannsson is  
23 kind of one disclosure of the same thing. Okay. They  
24 disclosed slightly different things. One you can touch and  
25 smell and feel, that's the thing. The patent has words. It

1 discloses some things more and some things less than what  
2 you can touch and smell and feel.

3 We think it has 90 percent of what your claim 1  
4 has, but then the other stuff is, the other thing, it's only  
5 one thing, does the receiving hole do the fastening  
6 function? That is what we found in summary judgment that is  
7 not anticipated, is not explicitly disclosed. A PHOSITA  
8 would have known that. That's obvious on what a PHOSITA  
9 knew, and whether the PHOSITA knew, they knew it was  
10 McIntire, they knew it was in Harhen. They knew it was in  
11 other locations.

12 I look at it as one argument. I understand  
13 that --

14 THE COURT: So maybe I misunderstand stood you,  
15 Mr. Reynolds. The RES belt and the Hermannsson, that by  
16 itself, if a PHOSITA was motivated to combine them, do they  
17 make obvious all the claims or is there something else?

18 Now what I'm understanding you to say is the RES  
19 belt and Hermannsson are basically two sides of the same  
20 coin.

21 MR. REYNOLDS: They are, Your Honor. Based on  
22 your ruling, the RES belt and Hermannsson, we're not going  
23 to argue together they disclose everything. They disclose  
24 the 90 percent.

25 THE COURT: Okay. I misunderstood what you were

1 saying.

2 All right. So the question is: The other ten  
3 percent, has your expert in his report disclosed it?

4 MR. REYNOLDS: Yes. We believe in many, many  
5 ways. The issue is, Your Honor, is that if you break it out  
6 that the RES belt plus Hermannsson plus PHOSITA is one thing  
7 and the RES belt and Hermannsson and McIntire is another  
8 thing and this is another thing --

9 THE COURT: I get it. That's a plus sign there.

10 MR. REYNOLDS: That's what that is. I am just  
11 saying --

12 THE COURT: All right. I thought not that was  
13 an equals.

14 MR. REYNOLDS: I'm sorry, Your Honor.

15 THE COURT: No. I get it now.

16 MR. REYNOLDS: A quick demonstrative at the  
17 eleventh hour here.

18 THE COURT: I get it.

19 MR. REYNOLDS: But that's our argument. I just  
20 wanted to sort of say to the Court and to opposing counsel  
21 here, we only have one argument. It's just we've all gone  
22 down this track of these analytical permutations and  
23 combinations. That's just not the way the case comes in I  
24 don't think. That's not the way we plan on doing it. If we  
25 were told by the Court that we have to stick to multiple

1 permutations, we'll do that, but that's the way I look at  
2 the case.

3 THE COURT: All right.

4 MR. NYDEGGER: So, Your Honor, this illustrates  
5 my point exactly. So it's not just one argument. In fact,  
6 Mr. Reynolds just said, we're going to argue that a PHOSITA,  
7 he knew about, for example, Harhen, and so because that's  
8 part of his background knowledge that he knew about, well,  
9 it would have been obvious to modify the RES but with  
10 Hermannsson. But in the Court's motion in limine, the Court  
11 expressly ruled the combination of the Nox RES belt and  
12 Hermannsson is out, and yet they're going to try and  
13 back-door this through the PHOSITA by saying, well, that is  
14 part of his knowledge. And that's where we don't know what  
15 they are trying to argue and where the expert witness, does  
16 not say just based on the general knowledge of a PHOSITA, a  
17 person of skill in the art --

18 THE COURT: He's going to say also McIntire,  
19 which is a specific reference and I think, I'm quite sure  
20 that the RES belt and the McIntire, Hermannsson and  
21 McIntire, that's a combination that the defense can use.  
22 Right?

23 MR. NYDEGGER: We would argue that, yes, that is  
24 still in the case. The combination of the RES belt plus  
25 McIntire or Hermannsson plus McIntire, those would still be

1 available at trial. Those have not been excluded at this  
2 point. But once again, we're entitled to know which of  
3 these they're going to argue and they can't argue, back-door  
4 these through just the knowledge general of a PHOSITA, which  
5 is what Mr. Reynolds just said they plan to do.

6 And if I could hand Your Honor -- may I  
7 approach, Your Honor?

8 THE COURT: Yes.

9 (Mr. Nydegger handed a document to the Court.)

10 MR. NYDEGGER: So this, Your Honor, this -- it  
11 says "Joint Proposed." Ignore the "Joint" because this is  
12 not joint. This was an eleventh hour demonstrative I did  
13 this morning and used a prior draft of the joint proposed  
14 verdict form. And in Nox Medical's verdict form that they  
15 submitted originally, it had all the combinations, all the  
16 permutations from Natus' March 25th e-mail that indicated it  
17 would follow, or that they intended to present at trial.

18 Well, from that, we've taken out claims 6, 17  
19 and 8, because in view of the Court's order yesterday, we're  
20 dropping those claims. And I will talk about the other  
21 claims that are still left here in a minute.

22 THE COURT: I see you've got three claims.  
23 That's certainly within the bounds of reasonableness.

24 MR. NYDEGGER: And the Court mentioned two in  
25 its order, but we were going to ask the Court for three.

1 THE COURT: Well, in some ways it doesn't make  
2 any difference, because claim 1, you could just say claim 5,  
3 claim 9, you would get to the same point.

4 MR. NYDEGGER: Almost, Your Honor. It is  
5 relevant when you come to secondary considerations and the  
6 nexus issue.

7 THE COURT: All right. Fair enough.

8 MR. NYDEGGER: But really, as you know, for  
9 validity, as far as showing where the elements are found in  
10 the prior art, it does not make a difference.

11 When it comes to the nexus issue, it does, which  
12 is why we would ask Your Honor that we be allowed the one  
13 independent claim --

14 THE COURT: Yes, yes. I'm all right with that,  
15 because in effect, from my point of view, you've got two  
16 claims.

17 MR. NYDEGGER: Okay.

18 THE COURT: I understand you have three, but  
19 close enough.

20 MR. NYDEGGER: All right. Thank you, Your  
21 Honor.

22 So what this shows is, this has all the  
23 permutations for those three claims that were disclaimed in  
24 Natus' March 25th e-mail. From that, the redline shows the  
25 ones that are no longer available.

1 And you can see that as far as claim 1 goes,  
2 based on their March 25th e-mail, there are still six  
3 permutations possibly available that they would argue. The  
4 Nox RES belt alone would be the one that the PHOSITA --

5 THE COURT: Mr. Reynolds is just saying, Gobron  
6 is not something that he's going to be arguing. It may be  
7 mentioned somewhere in the background, but not something  
8 he's arguing. Right?

9 MR. REYNOLDS: Your Honor, yes, that's right,  
10 but one of the things that -- two things. One is this  
11 verdict form, do you ever instruct -- do you ever put in  
12 your verdict form the specific combinations?

13 THE COURT: I haven't, but it's not a terrible  
14 idea, but I'm not deciding that right now.

15 MR. REYNOLDS: Okay, because that would change  
16 the way we would, of course, argue the case. We're not  
17 arguing specific combinations. We think the verdict form  
18 should say claim 1, yes or no, valid or invalid. Claim 5 or  
19 whatever you want to have, yes or no.

20 THE COURT: Yes.

21 MR. REYNOLDS: My only point is that we, as we  
22 sit here today, this is the first time we've seen the pared  
23 down list. I don't know with claim 5 or 9, what additional  
24 limitation saves the validity of it over claim 1. I don't  
25 think there's anything that --

1 THE COURT: All right. Well, in any event,  
2 we've spent enough time talking about this this morning  
3 because I don't have an unlimited amount of time.

4 MR. REYNOLDS: Sure.

5 THE COURT: Is there some takeaway you need from  
6 this, Mr. Nydegger?

7 MR. NYDEGGER: Well, Your Honor, originally, we  
8 started talking about the Nox RES belt and whether that  
9 would be available given there's no disclosure to modify  
10 that belt alone just based on the knowledge of a PHOSITA,  
11 not with reference to any other specific prior art. And so  
12 that's where we originally started.

13 But this does lead me to the second point that I  
14 wanted to discuss with Your Honor, and whereas the Court has  
15 asked us to narrow our claims down to three, we would ask  
16 the Court to have opposing counsel narrow its obviousness  
17 contentions down to three, as it indicated it would at the  
18 last summary judgment hearing.

19 THE COURT: Well, see, from looking at things,  
20 it appears to me that other than this reference to Gobron,  
21 there certainly is no more than four right now.

22 MR. NYDEGGER: Yes. Well, if Gobron is out,  
23 that certainly helps. This morning is the first time we've  
24 heard that Gobron may be out.

25 THE COURT: When we're saying "out," I don't



1 understand that it won't be mentioned. I'm just  
2 understanding that they won't be arguing, maybe they have a  
3 different idea of how they're going to argue this than what  
4 I usually see, but usually you argue to the jury some  
5 specific combination against the background of whatever it  
6 is that's out there, and. So I certainly understand them to  
7 be saying that they're not going to say Gobron and Lawrence  
8 or Gobron and Sommer. It seems completely inconsistent with  
9 what Mr. Reynolds just said.

10 MR. REYNOLDS: That's correct, Your Honor.

11 THE COURT: So, in any event, at least in my own  
12 mind I'm going to cross out Gobron, and I'm satisfied  
13 otherwise, because the RES belt, Hermannsson are more or  
14 less the same thing and that they've done enough narrowing  
15 here. All right?

16 MR. NYDEGGER: Okay.

17 THE COURT: Do you have anything else?

18 MR. NYDEGGER: Yes, Your Honor. My colleague,  
19 Mr. Lorimer, was just going to address one or two small  
20 matters.

21 THE COURT: All right. Mr. Lorimer, you have  
22 the important small matters.

23 MR. LORIMER: Perfectly suited to my abilities,  
24 Your Honor.

25 The first one again is a clarification of one of

1 the Court's orders on the motions in limine.

2 The Court ruled that the IPR materials are out,  
3 that they are not going to come in at all, and we understand  
4 that. Sort of the other side of that coin is that in Dr.  
5 Williams', Dr. Williams report, he makes a number of  
6 references to what the Examiner found or how he  
7 characterized particular references.

8 It seems to me they're all employees of the  
9 Patent and Trademark Office. We're not doing claim  
10 construction. We're not doing doctrine of equivalents or  
11 prosecution history estoppel. So we don't want the jury to  
12 be misled by having the defendant say, look, this is what  
13 the Examiner found, this is what the Examiner said, this  
14 piece of art teaches, so in fairness, it ought to be sauce  
15 for the goose and sauce for the gander.

16 THE COURT: Well, when you are talking about the  
17 Examiner, you're talking about the original prosecution.  
18 Right?

19 MR. LORIMER: I am, but he's not a PHOSITA. I  
20 don't want the jury believing just because he said it, it's  
21 true.

22 THE COURT: You know, I guess that's something  
23 we'll have to deal with at trial, but it strikes me that if  
24 what the Examiner is doing is not claim construction, which,  
25 of course, then we don't count that, but it strikes me that

1 if he is a person of ordinary skill in the art, my  
2 understanding is that, generally speaking, patent examiners  
3 are people of ordinary skill in the art, but I don't know  
4 what the person of ordinary skill in the art here is.

5 MR. LORIMER: We certainly don't know what this  
6 examiner's background was.

7 THE COURT: Isn't the standard of ordinary skill  
8 in the art pretty low for this?

9 MR. LORIMER: We have define amongst us, we've  
10 agreed what that level of skill is.

11 THE COURT: AND what is it?

12 MR. LORIMER: It is either somebody with an  
13 advances degree and less experience, or lesser degree and  
14 more experience in the field of engineering, electrical  
15 engineering or medical devices. And we have no idea what  
16 this examiner's background is. We can't, we can't know. We  
17 can't depose him.

18 THE COURT: No, no, I understand that. All  
19 right. Well, I will think about that.

20 What else?

21 MR. LORIMER: The only other thing is, Your  
22 Honor, at the last hearing we were very short on time  
23 and the Court was not feeling well, and we didn't hear  
24 the inequitable conduct motion for summary judgment, and  
25 we're curious whether the Court would like to hear that

1 today.

2 THE COURT: No. I don't want to hear that

3 today.

4 MR. LORIMER: All right.

5 THE COURT: My plan is, we'll just try that

6 after we finish with the other trial.

7 MR. LORIMER: And in that regard, Your Honor,

8 this trial is set to go from Monday to Wednesday, I think.

9 THE COURT: Yes.

10 MR. LORIMER: The 30th to the 2nd. So is the

11 intent that we would start inequitable conduct on the

12 morning of Thursday?

13 THE COURT: Is that something you can do?

14 Actually, we are going to talk in a minute about how long --

15 so I don't recall seeing anything.

16 How much time do we need for this inequitable

17 conduct trial?

18 MR. LORIMER: We don't think very long at all.

19 I wouldn't speak for Mr. Reynolds, however.

20 THE COURT: Do you have --

21 MR. REYNOLDS: We've been assuming it's one day,

22 Thursday.

23 THE COURT: All right. Well, so, yes. So we

24 should just plan that we'll do that at the end of the other

25 trial. And, in fact, you should really plan that once the

1 jury starts to deliberate on the first thing, we'll just  
2 start the inequitable conduct since we'll all be hanging  
3 around anyhow. Okay?

4 MR. LORIMER: Very well.

5 THE COURT: So that brings up a question of how  
6 long do you all think you need to try the case? And by that  
7 I mean, the way I count things, which is I give each side a  
8 certain amount of time, and for that time, that covers your  
9 opening statement, your direct exam, and your cross exam.  
10 It does not cover closing arguments.

11 MR. LORIMER: Your Honor, we have -- we believe  
12 it can do it in the three days the Court has allotted, but  
13 not less than that.

14 We're going to be pushing it to get --

15 THE COURT: Yes. I wasn't really -- and,  
16 Mr. Reynolds, I take it from what you've said, that you  
17 think likewise?

18 MR. REYNOLDS: Yes. I think three days is fine.  
19 It somewhat depends on the what the counter to our  
20 invalidity case is. Yes, we can make it happen.

21 THE COURT: Okay. So in terms of hours, seven  
22 hours a side?

23 MR. LORIMER: Well, Your Honor, it depends on,  
24 of course, how long it takes us to pick the jury.

25 THE COURT: No, the jury, that's on me.

10:26:17 1 MR. LORIMER: Oh, that's on you?

10:26:18 2 THE COURT: Yes. If it takes for four days, you  
10:26:22 3 still get seven hours a side. I will tell you how long it's  
10:26:24 4 actually going to take. It's going to take an  
10:26:27 5 hour-and-a-half.

10:26:28 6 MR. LORIMER: Okay.

10:26:28 7 THE COURT: But you don't have to worry about  
10:26:30 8 that.

10:26:30 9 MR. LORIMER: Okay. Okay. Well, we were under  
10:26:32 10 the belief that the Court's trial days are about six hours,  
10:26:35 11 five-and-a-half, six hours a day?

10:26:38 12 THE COURT: Six, yes.

10:26:39 13 MR. LORIMER: Six hours. And so we were  
10:26:40 14 thinking that if we divide that in two, that's nine hours  
10:26:44 15 each.

10:26:45 16 THE COURT: Yes. That's not a three-day trial  
10:26:46 17 though, because the jury doesn't get picked like that.

10:26:50 18 MR. LORIMER: Fair enough. Fair enough. We  
10:26:53 19 were thinking more like eight hours, Your Honor.

10:26:55 20 THE COURT: All right. Mr. Reynolds?

10:26:57 21 MR. REYNOLDS: Seven or eight is fine with us.

10:27:00 22 THE COURT: All right. Well, I will tell you  
10:27:02 23 what. I will go with seven-and-a-half. And the thinking  
10:27:05 24 there is based on prior experience, the 18 hours that are in  
10:27:11 25 Monday through Wednesday, I say it will take an

1 hour-and-a-half to pick the jury, and I think that's  
2 probably a very close estimate, but I've got opening  
3 instructions to give and that takes some time.

4 Do you all want to play the patent video or  
5 not?

6 MR. LORIMER: Your Honor, we've spoken about  
7 that just this morning, and we would prefer to do the patent  
8 video. It's short. It's fair. It's even-handed.

9 THE COURT: All right. What about you?

10 MR. REYNOLDS: We have to review it, Your Honor.  
11 I've seen the 1985 one or whatever, so I want to see the new  
12 one, just take a look at that. We just got that raised to  
13 us this morning.

14 THE COURT: All right. Why don't you think  
15 about it. My preference would be to play it because it does  
16 give them an overview of the system. The only thing that  
17 I'm sure Ms. Palapura and Mr. Connolly know is, that when we  
18 do play the modern version, the part where Judge Fogel says  
19 "I'm a United States District Judge" has to be edited out.  
20 It's fine if he says he's the Administrative Officer of the  
21 Courts, or whatever his other title is. We once had a jury  
22 thinking he was the one that was instructing them as opposed  
23 to the person in the black robe here.

24 But that would be my preference. But if you  
25 don't want to do it, let me know. I'm not wedded to it.

1 Okay?

2 But I think -- and that doesn't count against  
3 your time either, but it does take up some time. That's the  
4 reason why I think seven-and-a-half hours is the right  
5 number.

6 MR. LORIMER: On that issue, Your Honor, as part  
7 of the pretrial order, we have looked at the juror  
8 questionnaire that the Court submitted in the Wilmington  
9 Trust case.

10 THE COURT: Yes, which is bad to go by, because  
11 that was in person at the court. It wasn't mailed out. And  
12 so I don't mail out questionnaires telling them who the  
13 parties are because then the person will Google the parties,  
14 and all of a sudden I've got a whole bunch of disqualified  
15 jurors.

16 So I think actually, it will be just as  
17 efficient and we'll have the benefit that you get to see the  
18 people speak when they give their answers to just do the  
19 basic questionnaires that I, or the basic in-court  
20 questionnaire, questioning that I normally do. When I have  
21 sent out things in advance in patent cases, it has been a  
22 maximum of two pages, and it basically it is just the same  
23 questions, the same general material you get in court while  
24 creating a lot of paper.

25 I did notice that there was some request that if



1 I didn't send out the questionnaire, that I add four  
2 questions from the proposed questionnaire. One of them had  
3 to do with, have you served on a jury trial before, civil  
4 jury trial. I will include that question. The other three,  
5 I won't.

6 MR. LORIMER: Okay.

7 THE COURT: All right?

8 MR. LORIMER: Those are my small things, Your  
9 Honor.

10 MR. REYNOLDS: On the matter of preliminary jury  
11 instructions and the video, we'll propose that we will work  
12 together. We're trying to work together to have a single  
13 preliminary jury instruction document.

14 THE COURT: Well, that would be good.

15 MR. REYNOLDS: And I think it's April 20th, you  
16 asked for a letter, the 18th. Okay. The 18th. You asked  
17 for a letter from us and we will advise as to where we are  
18 on that. I assume that we'll be able to agree on the video  
19 and/or the preliminary jury instructions.

20 THE COURT: Yes. I actually wrote on here,  
21 parties had submitted two versions.

22 MR. REYNOLDS: Right.

23 THE COURT: I require -- and the preliminary  
24 jury instructions is a lot closer obviously than the final  
25 jury instructions, but I do require you to submit one

1 document so I don't have to sit there comparing pages,  
2 trying to figure out what it is you're actually disagreeing  
3 about.

4 The other thing I would suggest is, the more  
5 disagreements I see, the more I just pick the one that I did  
6 in the last jury trial and use it again, just plugging in  
7 the two paragraphs where you describe what your dispute is.  
8 I mean, that's the most significant thing you can do for me  
9 in preliminary jury instructions, is figure out the way to  
10 characterize for the jury what it is they're about to see,  
11 because you know your case a lot better than I do.

12 But, in any event, if you can submit  
13 something --

14 MR. LORIMER: We're happy to do that.

15 THE COURT: That would be good.

16 MR. REYNOLDS: Thank you.

17 THE COURT: For what it's worth, the proposed  
18 verdict form and the proposed final jury instructions, I  
19 basically don't pay them any attention until we start the  
20 trial, and the way that I'm envisioning this happening is,  
21 the testimony would take us through Wednesday. The jury  
22 would be charged on Thursday morning and closing arguments  
23 would be on Thursday morning. And so we'd have a prayer  
24 conference perhaps Tuesday, after the testimony on Tuesday.  
25 I mean, it depends how much is actually in disagreement,

1 which when you submit something in one document, I will have  
2 a much better idea. Okay?

3 MR. LORIMER: Great.

4 THE COURT: Anything else that you all want to  
5 discuss?

6 MR. LORIMER: No. I'm assuming given the  
7 Court's comments that we are not going to be bumped by  
8 the current proceedings, that we're going to go forward  
9 on --

10 THE COURT: You know, it's hard to say. I'm  
11 thinking that they will resolve by that time, but I don't  
12 know.

13 I also have another trial, another civil trial  
14 scheduled the same day. I've got to keep these balls up in  
15 the air and see what is still left.

16 MR. LORIMER: So the Court will obviously inform  
17 us at some point that we need to be here on that day, I  
18 assume.

19 THE COURT: Well, right now you should operate  
20 on the principle you need to be here that day.

21 MR. LORIMER: I'm sorry: You're correct.

22 THE COURT: Yes, yes. I know what you meant to  
23 say. No problem.

24 Is there anything in particular you want to  
25 bring up, Mr. Reynolds?

10:33:20 1 MR. REYNOLDS: No Your Honor.

10:33:20 2 THE COURT: Let me just go through. In the  
10:33:22 3 pretrial order -- oh, there was a dispute as to whether  
10:33:27 4 these products should be called the infringing products or  
10:33:29 5 the accused products. To the extent you have to call them  
10:33:34 6 one or the other, call them the accused products, because  
10:33:37 7 until we figure out whether the patent is valid or not,  
10:33:43 8 they're not infringing.

10:33:46 9 I'm going to have to tell them, and, in fact,  
10:33:50 10 I'm not entirely sure how I'm going to do this, but I'm  
10:33:54 11 certainly going to have to -- in fact, this is something  
10:34:02 12 else you could work on. You have not actually figured out  
10:34:05 13 how it is I'm going to tell the jury it's agreed that the  
10:34:12 14 products meet the claims of the patent, have you?

10:34:21 15 MR. LORIMER: We were just planning on using the  
10:34:24 16 language of the Court's order that said the parties have  
10:34:26 17 agreed that they infringe. That's what it says.

10:34:29 18 THE COURT: And that was the court order that I  
10:34:34 19 actually wrote like two years ago. Right?

10:34:38 20 MR. NYDEGGER: Actually, Your Honor, that was a  
10:34:40 21 stipulated order that the Court just signed. It was drafted  
10:34:42 22 by defendants.

10:34:43 23 THE COURT: Oh, okay. All right.

10:34:46 24 Mr. Reynolds, what do you have to say about  
10:34:48 25 that?

1 MR. REYNOLDS: Your Honor, I'm trying to  
2 remember if we have something in either the final jury  
3 instructions or -- yes, we're fine with that. In C-35 on  
4 page 10, it says Natus has stipulated that its products,  
5 parts number. And we did have the word "infringe" in there,  
6 but then we don't want to have the drumbeat of infringing  
7 products. That's why we had that slash in there. Yes,  
8 you've got the issue.

9 THE COURT: All right. Well, so if I use  
10 basically the wording that's in paragraph 35, and I suggest  
11 that you might even want to put it in the preliminary jury  
12 instructions -- I mean, I think I ought to tell them that  
13 before you start doing opening statements.

14 MR. REYNOLDS: I'm sorry, Your Honor, yes. If  
15 you talk to the jury either in preliminary jury instructions  
16 or in final, that's why I wonder if we have that, I think  
17 our language was like stipulate that the claims cover the  
18 product or something like that. We had some language that  
19 was not this. Right?

20 THE COURT: Well, so I will tell you what. You  
21 all talk to each other about it. I've had disputes on this  
22 before, this kind of thing.

23 So it would be best if you had some proposal  
24 that told me exactly what it is you want me to tell the  
25 jury. I think it is required as a -- I think it should be

1 in the opening statement to orient them, particularly if  
2 we're going to be playing the patent video which, after all,  
3 needs to be part of it, about the boundaries and  
4 infringement, which I think they ought to have the  
5 understanding of what it is we're talking about, but then I  
6 think also, as a stipulation of fact, which could be  
7 paragraph 35, it ought to actually be presented to the  
8 jury.

9 MR. REYNOLDS: Okay. But you want it in both  
10 the preliminary jury instructions and the final.

11 THE COURT: That's my thinking. You all can  
12 talk to each other and working on the preliminary jury  
13 instructions, see whether you agree on that. But it seems  
14 to me to just make sense, because it would be kind of odd I  
15 instruct the jury, here are the issues in the case. Part of  
16 that is, I would think that I'm going to instruct them,  
17 infringement is not an issue, because --

18 MR. REYNOLDS: Okay. Well, we'll work on that,  
19 Your Honor. We knew it was going to be potentially an issue  
20 for final jury instructions, but as we are working towards  
21 the submissions to you next week, we will see if we can put  
22 it in both sides.

23 THE COURT: All right. Nevertheless, I would  
24 think during the trial, the normal way to refer to the  
25 product is going to be the belt.

1 MR. LORIMER: Yes. The Natus belt or something  
2 like that. We're happy with that.

3 MR. REYNOLDS: Fine.

4 THE COURT: All right. So there's talk on pages  
5 15, 16 -- pages 15 and 16 in paragraphs 55, 56 and 57, which  
6 I think have to do -- I think these are all stipulations. I  
7 don't know what they are, actually, but, in any event, one  
8 thing I couldn't tell from the objections of Nox is whether  
9 these patents are referred to in your expert reports, this  
10 being the Archer patent, the Caldecott reference and the  
11 Takeda reference.

12 MR. REYNOLDS: You said Nox. Did you ask if  
13 it's in --

14 THE COURT: Well, Nox is the one who is  
15 objecting. They say, you did not identify these patents as  
16 a basis for finding obviousness. I can't tell --

17 MR. REYNOLDS: They are all in the expert  
18 report.

19 THE COURT: All right. So they're just part of  
20 the background?

21 MR. REYNOLDS: Yes.

22 MR. NYDEGGER: They are in the expert report.  
23 As we've discussed already, they're not part of the  
24 obviousness combinations or anything that they're asserting.

25 THE COURT: Okay.

1 MR. NYDEGGER: And so if they're not relying on  
2 them, we don't think they should be in the case.

3 THE COURT: No. They'll decide what is  
4 redundant in terms of the background, but I'm certainly  
5 not going to say that in the first instance they can't  
6 decide what background information they want to present.  
7 I mean, it's in their expert report, so I'm going to let  
8 them do it.

9 MR. NYDEGGER: All right. Your Honor, my only  
10 concern is, and I mentioned this before, is that we believe  
11 that there has to be some kind of a separation between the  
12 background knowledge of a person of skill in the art and  
13 reliance on a reference. I mean, they should not be allowed  
14 to say, for example, the Takeda reference, that Takeda  
15 teaches element X, and so that's in the background knowledge  
16 of a PHOSITA, and then argue that, oh, well, a PHOSITA knew  
17 this, and so would have modified it to have it, because  
18 that's the same thing as arguing that the combination of  
19 Takeda.

20 THE COURT: All right. Well, I can't rule on  
21 hypothetical situations. I'm certainly going to --  
22 normally, a way to do this, and I'm not telling the  
23 defendant that's the way they have to do it -- normally, the  
24 expert spends some time talking about the development in the  
25 field so that the jury has kind of a perspective on this.



1 They lead up to whatever their lead references are, which I  
2 take it are the belt and McIntire, and then the expert does  
3 motive to combine and reasonable expectation of success, and  
4 voila, you have your case.

5 MR. NYDEGGER: And if it's just used for  
6 purposes of general background, then we have no objection,  
7 but, once again, if they plan to argue that a PHOSITA, if  
8 they're going to try and pull specific elements from the  
9 general background, that's where we have an issue.

10 THE COURT: Yes. I mean, it seems like it's not  
11 going to be very necessary because they are saying the  
12 elements are elsewhere. But some things you have to object  
13 to at trial.

14 MR. NYDEGGER: Okay. Thank you, Your Honor.

15 THE COURT: All right. So the list of witnesses  
16 to be called, this is page 21 and 22. I counted ten people  
17 on the live, the will call live witnesses. Actually, I  
18 guess it's may call even on that.

19 But so just to go over them, Oslan is the  
20 plaintiff's technical expert. Cragun is the plaintiff's  
21 damages expert.

22 On the defense side, Williams is the technical  
23 expert and Bero is the damages expert. Right?

24 MR. REYNOLDS: That's right.

25 THE COURT: Okay. So then we also have Terrence

1 Murphy, Peter Halldorsson, Sveinbjorn Hoskuldsson and Austin  
2 Noll. I take it, I can't remember now. Either Hoskuldsson  
3 or Halldorsson, one of them is the co-inventor. Right?

4 MR. NYDEGGER: Well, those are, those two  
5 together are the co-inventors.

6 THE COURT: Oh, I thought you had earlier  
7 represented that one of those two would not be appearing  
8 live.

9 MR. NYDEGGER: Oh, I'm sorry, Your Honor. We  
10 have Hoskuldsson, Hermannsson and Halldorsson. Halldorsson,  
11 Peter Halldorsson, he is a company representative.  
12 Sveinbjorn Hoskuldsson, he is a co-inventor.

13 THE COURT: Okay. All right. So who is Austin  
14 Noll?

15 MR. NYDEGGER: Austin Noll was the 30(b)(6)  
16 representative of Natus on discovery.

17 THE COURT: So I take it Austin Noll is not  
18 actually going to be here live? He's on videotape saying  
19 whatever it is he says?

20 MR. NYDEGGER: At least, at least he'll be  
21 presented by deposition. If he's here, we will call him  
22 live. We can't force him to come here, but if he's here, we  
23 will call him.

24 THE COURT: When is it that you expect to get  
25 out of calling him live?

1 MR. NYDEGGER: Well, more or less, the same  
2 things that we got out of him when we deposed him, only we  
3 think it's a little more engaging and dynamic for the jury  
4 to pay attention and understand.

5 THE COURT: Do you expect him to be here?

6 MR. REYNOLDS: He won't be here, Your Honor.

7 THE COURT: All right. Well, there's a  
8 representation, so you can make sure you have your videotape  
9 lined up, and that's one less witness.

10 MR. NYDEGGER: Thank you.

11 THE COURT: So who is Terrence Murphy?

12 MR. NYDEGGER: Terrence Murphy is a former  
13 employee of Natus.

14 THE COURT: Oh, he is the one with the willful  
15 e-mail, knock off, that guy?

16 MR. NYDEGGER: That's the guy.

17 THE COURT: Okay. And he's going to be here  
18 live?

19 MR. NYDEGGER: We understand that he is, Your  
20 Honor.

21 THE COURT: Okay. Mr. Jacobi, you're standing  
22 up for a reason?

23 MR. JACOBI: I just like to stand up once in  
24 awhile.

25 THE COURT: That's all right. If anybody has

1 back problems, feel free to stand up as needed.

2 MR. JACOBI: I was just going to confirm to the  
3 Court that Mr. Murphy will be here live.

4 THE COURT: Okay. All right. All right. And  
5 then on the defendant's list, there's also Anthony Ferrelli.  
6 Who is he?

7 MR. JACOBI: Mr. Ferrelli is in charge -- he  
8 actually replaced Terrence Murphy when Terrence Murphy  
9 retired. He was in charge of marketing from the time that  
10 the belt was released and is a representative of Natus, so  
11 he will be here live.

12 THE COURT: Okay. And he's going to testify  
13 about the marketing of your product?

14 MR. JACOBI: His testimony will bear on  
15 marketing of the product insofar as that affects damages,  
16 and also just to provide the jury a basic outline.

17 THE COURT: All right. Who is Sterling Filmore?

18 MR. JACOBI: Mr. Filmore has not been deposed.  
19 He's identified on our 26(a) one disclosures as a  
20 representative of the law firm who was responsible for the  
21 prosecution of the patent-in-suit, and his testimony bears  
22 on the issues involved in inequitable conduct.

23 And we understand from defendant's counsel --  
24 plaintiff's counsel that he is not available and will not be  
25 attending, but --

1 THE COURT: Okay.

2 MR. JACOBI: He's listed at this point.

3 THE COURT: All right. I take it he's probably  
4 based in Utah?

5 MR. NYDEGGER: Yes, Your Honor.

6 THE COURT: All right. Okay. So, in any event,  
7 plaintiff has represented he's not going to be attending and  
8 certainly would be shocked if he decided to show up here on  
9 vacation.

10 All right. So we're down to eight witnesses,  
11 max, or eight live witnesses.

12 MR. JACOBI: Your Honor, could I just further  
13 elaborate on the identification of Mr. Filmore?

14 Mr. Filmore is not counsel of record for the  
15 prosecution. The entire law firm is including Mr. Nydegger  
16 and several other people. And to the extent that they have  
17 knowledge about some of the issues that have come up in the  
18 inequitable conduct claim, we believe it's germane to those  
19 issues and their testimony would be valuable to the Court in  
20 deciding that issue.

21 THE COURT: Well, time to find out if Mr.  
22 Filmore, or to try to find out -- I guess I'm not sure.  
23 What is your point, Mr. Jacobi?

24 MR. JACOBI: That the issues, the issues  
25 specifically here are in September or before the patent

1 issued, Workman Nydegger took over the prosecution of the  
2 patent. They never did anything to address --

3 THE COURT: No. What is it you're telling me?  
4 That I should be issuing a subpoena for Mr. Filmore to show  
5 up and show whether he knows whether or not Utah is within a  
6 hundred miles of Delaware or what?

7 MR. JACOBI: It doesn't need to be Mr. Filmore  
8 because it isn't Mr. Filmore who is solely the attorney.  
9 It's Workman Nydegger.

10 This is all outside the jury's --

11 THE COURT: Yes. So I am not going to let you  
12 call the law firm representative on the other side if that's  
13 what you are asking me to do.

14 MR. JACOBI: All right. That's fine, Your  
15 Honor.

16 THE COURT: All right.

17 MR. LORIMER: Well, I agree completely, so I  
18 will sit down.

19 THE COURT: All right. All right. Yes. And  
20 this is a minor thing. The pretrial order says at page 26,  
21 each trial day will begin at 9:00 a.m., which is correct for  
22 the lawyers, but we don't actually get the jury started  
23 until 9:30. 9:00 a.m. is for you to interact with me on  
24 whatever your disputes are.

25 On page 27, the order of presentation of

1 evidence, paragraph 5, closing arguments, Nox Medical first  
2 followed by Natus followed by Nox Medical's rebuttal.

3 Nox understands you're going to be making your,  
4 not only your willfulness and damages, but your also  
5 nonobvious arguments as part of your main closing argument?

6 MR. NYDEGGER: Yes, Your Honor.

7 THE COURT: Okay. So the chances of you getting  
8 any rebuttal are just about nil.

9 MR. NYDEGGER: Duly noted. Thank you, Your  
10 Honor.

11 THE COURT: Okay. All right. So page 28,  
12 paragraph 122. I dealt with the voir dire examination.

13 Paragraph 128 on page 29, you say persons not  
14 entitled to have access to confidential or confidential  
15 attorneys' eyes only information shall be excluded from the  
16 courtroom at the request of any parties subsequent to the  
17 Court's approval during the presentation of any evidence  
18 designated confidential, confidential attorneys' eyes only,  
19 or any testimony reasonably anticipated with such  
20 information.

21 If you work out some agreement between  
22 yourselves as to what you are doing, that's fine. Don't  
23 expect me to be excluding anybody from the courtroom. Okay?  
24 All right.

25 So let's see. I have something else tabbed

1 here. What is this? Okay. So actually, that's all I've  
2 got. Let me check my other list here.

3 So I take it that you're not anticipating any  
4 witness scheduling problems?

5 MR. NYDEGGER: No, Your Honor. We're not.  
6 Actually, Your Honor, one real quick clarification. The  
7 exclusionary rule for the witnesses will still apply, we  
8 assume?

9 THE COURT: Yes, yes.

10 MR. NYDEGGER: Okay.

11 THE COURT: Sorry. Sequestration. You each get  
12 a representative. The experts can sit in, but to the extent  
13 you have fact witnesses, they are sequestered.

14 MR. NYDEGGER: All right. Thank you, Your  
15 Honor.

16 THE COURT: All right. Thank you, Mr. Nydegger.

17 All right. And so I also saw defendants have  
18 filed a motion to stay, which I take it is based on your  
19 belief that the PTAB got their analysis wrong. Unless both  
20 sides agree to stay the case, I'm not going to stay the  
21 case.

22 MR. REYNOLDS: Your Honor, to be completely fair  
23 about it, you know, we wanted to put that in front of you  
24 because it's not just that. It also that we stopped making  
25 the product. We wanted to give the option. We're somewhat



1 ambivalent. We want to give the option to save the cost and  
2 the jury and all of that now. That's fine. If you are  
3 denying it, we can save them the response if they are not  
4 going to join in the motion.

5 MR. NYDEGGER: We do not join the motion, Your  
6 Honor.

7 THE COURT: All right.

8 MR. NYDEGGER: So, Your Honor, do we not need to  
9 worry about responding?

10 THE COURT: Yes. Yes. I will just enter an  
11 order denying it.

12 MR. NYDEGGER: Thank you.

13 MR. REYNOLDS: Your Honor, if you want, I could  
14 put on the record that we withdraw the motion.

15 THE COURT: Okay.

16 MR. REYNOLDS: Sure.

17 THE COURT: That is even better.

18 MR. REYNOLDS: I mean, just to make it easy in  
19 light of the Court's comments and what the point of that  
20 motion was, we're happy to withdraw the motion on the  
21 record.

22 THE COURT: All right. Okay. The motion is  
23 withdrawn.

24 All right. Is there anything else? That's --

25 MR. NYDEGGER: Your Honor, nothing else from Nox

1 Medical.

2 MR. REYNOLDS: We have two little housekeeping  
3 things.

4 One is, do you have a page limit you want for  
5 the briefing you requested by next Friday?

6 THE COURT: No. I thought it was something that  
7 would not require so many pages that you would outrage me by  
8 submitting something that was too long.

9 MR. REYNOLDS: Right. We think it's a page or  
10 two.

11 THE COURT: Okay. Well, you don't need to make  
12 it five just to impress me.

13 MR. REYNOLDS: Okay.

14 THE COURT: But if that's it, I thought it was  
15 not terribly long, so I was going to leave it to your own  
16 good judgment.

17 MR. REYNOLDS: Okay. Sure.

18 And the second thing was, Alan, you had one  
19 thing.

20 MR. NICGORSKI: Yes. Just a clarification,  
21 because there are some witnesses who may be -- for instance,  
22 Mr. Murphy they have on their list.

23 Does Your Honor have a preference in terms of,  
24 you know, one time on, one time off?

25 THE COURT: I do, yes. Thank you for bringing

1 that up. Yes. My preference is if at all possible, just  
2 put them on the stand once. I understand for the technical  
3 experts, that's not possible.

4 Is your technical expert going to testify in  
5 your case-in-chief?

6 MR. NYDEGGER: No, Your Honor.

7 THE COURT: Oh, all right. Well, so you  
8 mentioned something about secondary consideration. Are  
9 there any secondary considerations coming from anybody other  
10 than the technical expert?

11 MR. NYDEGGER: Yes, Your Honor. Also our  
12 damages expert. Secondary consideration of commercial  
13 success.

14 THE COURT: Okay. Presumably, the damages  
15 person, I'm not going to make you put on the commercial --  
16 wait. I guess the burden is on you.

17 Maybe it would make sense since commercial  
18 success is presumably tied up with the damages to do that  
19 all at once?

20 MR. NYDEGGER: We would be fine with that. And  
21 just to clarify, Your Honor, when I responded to the  
22 question, I was thinking about people who will actually talk  
23 about, this is a secondary consideration type thing. Of  
24 course, there are facts in the case about secondary  
25 considerations.

1 THE COURT: Right. Right.

2 MR. NYDEGGER: Long-felt need, but those will  
3 come out from the fact witnesses when they're originally  
4 on.

5 THE COURT: All right. Okay.

6 MR. NICGORSKI: My thought, it was more like a  
7 person like Mr. Murphy, you know, dealing with scope  
8 objections or just get them done.

9 THE COURT: No.

10 MR. NICGORSKI: Okay.

11 THE COURT: As you go, do what you need to do.

12 MR. NICGORSKI: Clock method.

13 THE COURT: I'm sorry?

14 MR. NICGORSKI: Sort of with the way time is  
15 kept, it probably makes sense.

16 THE COURT: It probably does.

17 MR. NYDEGGER: Your Honor, we would ask for one  
18 exception to that, and that's with regard to witnesses that  
19 may have evidence concerning the inequitable conduct.

20 THE COURT: Right. They're different.

21 MR. NYDEGGER: They're different?

22 THE COURT: Inequitable conduct is not going to  
23 occur in front of the jury.

24 MR. NYDEGGER: Okay. I just wanted to make sure  
25 that was clear. Thank you.

1 THE COURT: Okay.

2 MR. NYDEGGER: Sorry. I keep getting up when I  
3 think I'm done.

4 On the briefing issue that Mr. Reynolds brought  
5 up, that raises one briefing issue on our end.

6 The Court has asked the defendants to submit a  
7 letter to the, Court and we would just ask that we have an  
8 opportunity to respond if we feel one is necessary. We  
9 don't know whether one would be or not.

10 THE COURT: That was on the disclosure. Right?  
11 That's what we're talking about?

12 MR. NYDEGGER: Motivations to combine, yes.

13 THE COURT: Sure. When did I tell them?  
14 Tuesday or Wednesday?

15 MR. NYDEGGER: One of those.

16 MR. REYNOLDS: The 18th, I believe.

17 THE COURT: All right. Yes, if you want to  
18 respond, if there's something you need to respond two days  
19 later, it's not as though I'm going to do something in the  
20 interim.

21 MR. NYDEGGER: Okay. Thank you.

22 THE COURT: All right. So I will sign an order  
23 adopting your proposed pretrial order, which basically is  
24 modified by whatever we've discussed here today.

25 And I've got something else I've got to do at

1 soon, so unless there's anything else, I will see you down  
2 the road.

3 And I would just ask the local counsel, Delaware  
4 counsel, to monitor my criminal trial. Okay? If it starts  
5 to be obvious that the criminal trial is not going to end  
6 in time, you should be able to figure that out from  
7 something.

8 Okay? All right. We'll be in recess.

9 (Counsel respond, "Thank you, Your Honor.")

10 (Hearing concluded at 11:58 a.m.)

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